

Supreme Court, U. S.  
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MICHAEL P. BRADY, JR., CLERK

# SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. \_\_\_\_\_

**78-50**

**MORRIS WELLS** - - - - - **Petitioner**

*versus*

**COMMONWEALTH OF KENTUCKY** - **Respondent**

On Petition for Writ of Certiorari to the  
Supreme Court of Kentucky

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## INDEX

	PAGE
Table of Authorities.....	ii-iii
Counterstatement of the Question Presented.....	1
Opinion Below .....	1
Jurisdiction . . . . .	2- 4
Constitutional and Statutory Provisions Involved....	4
Counterstatement of the Case.....	4- 9
Argument — Trial Court's and Kentucky Supreme Court's Interpretation of KRS 422.150 Did Not Violate the Constitutional Rights of the Petitioner.	9-14
Conclusion . . . . .	14
Proof of Service.....	15

## TABLE OF AUTHORITIES

iii

### Cases:

	PAGE
Beazell v. Ohio, 269 U. S. 167 (1925).....	11
Bell v. State of Maryland, 378 U. S. 226 (1964).....	3
Bouie v. City of Columbia, 378 U. S. 347 (1964).....	10, 11, 13
Cardinale v. Louisiana, 394 U. S. 437 (1969).....	3
City of Charleston v. Mitchell, 239 S. C. 376, 123 S. E. 2d 512, <i>reversed</i> 378 U. S. 551 (1964).....	10
Denny v. Commonwealth, 274 Ky. 419, 118 S. W. 2d 778 (1938) .....	2, 10
Dobbert v. Florida, 434 U. S. 882 (1977).....	11
Duncan v. Missouri, 152 U. S. 377 (1894).....	13
Fuqua v. Commonwealth, 118 Ky. 578, 81 S. W. 923 (1904) .....	8, 10
Helpenstine v. Commonwealth, Ky., 566 S. W. 2d 415 (1978) .....	11
Henry v. State of Mississippi, 379 U. S. 443 (1965).....	3
Hopt v. Utah, 110 U. S. 574 (1884).....	11-12, 13
Lake v. Commonwealth, 31 Ky. Law Rep. 1232, 104 S. W. 1003 (1907).....	10
Mallett v. North Carolina, 181 U. S. 589 (1900).....	11
Monks v. New Jersey, 398 U. S. 71 (1970).....	3
Noe v. Commonwealth, Ky., 396 S. W. 2d 808 (1965) .....	8, 11
Splawn v. California, 97 S. Ct. 1987, — U. S. — (1977) .....	13
Tacon v. Arizona, 410 U. S. 351 (1973).....	3
Thompson v. Missouri, 171 U. S. 380 (1898).....	13
Wells v. Commonwealth, Ky., 562 S. W. 2d 622 (1978) .....	8

### Kentucky Statutes:

421.210 .....	6, 7
422.150 .....	2, 6, 7-8, 9, 11, 14
507.020(1)(a) .....	4

### Federal Constitution:

Article I, Section 10.....	2
----------------------------	---

### Other Citations:

	PAGE
Title 28 U.S.C. §1257(3).....	2, 4
Rule 7.20, Rules of Criminal Procedure.....	2, 7, 8, 9
Rule 7.22, Rules of Criminal Procedure.....	7, 8, 9, 11, 14

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MORRIS WELLS - - - - - *Petitioner*

v.

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ON PETITION FOR WRIT OF CERTIORARI TO THE  
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BRIEF FOR RESPONDENT IN OPPOSITION TO  
PETITION FOR WRIT OF CERTIORARI

COUNTERSTATEMENT OF THE QUESTION  
PRESENTED

Whether Opinion of the Supreme Court of Kentucky effectively denied the petitioner his constitutional right to a fair trial and due process of law?

## OPINION BELOW

The Opinion Below from the Supreme Court of Kentucky is styled Morris Wells v. Commonwealth of Kentucky, 562 S. W. 2d 622 (1978). The Opinion of the Supreme Court of Kentucky is correctly set forth in the Petitioner's Appendix at page 1a of his Petition for Writ of Certiorari.



### JURISDICTION

Petitioner's application for a Writ of Certiorari should be denied for the reason that said petition does not comply with the requirements of 28 U.S.C. §1257 (3).

Petitioner's sole justification for invoking the jurisdiction of this Court is based on a contention that the interpretation given to KRS 422.150 by the Supreme Court of Kentucky offends the due process clause of the Fifth and Fourteenth Amendments to the Constitution of the United States. The petitioner further contends that the Opinion of the Supreme Court of Kentucky is in effect a retroactive application of a statute and thus the Opinion is offensive to the Ex Post Facto Clause of the Constitution of the United States, Article I, Section 10.

The respondent submits that the petitioner is raising for the first time a question involving the proper application of the due process and ex post facto clauses to the statute involved in the case at bar. This question has never been presented to either the trial court or the Supreme Court of Kentucky. Both tribunals below were concerned exclusively with the question of whether the trial court could properly admit into evidence over the objections of the petitioner a transcript that had been compiled at a previous trial. The trial court, relying on the Kentucky decision of *Denny v. Commonwealth*, 274 Ky. 419, 118 S. W. 2d 778 (1938), ruled that the transcript was admissible. The Supreme Court of Kentucky upheld the trial court's interpretation of KRS 422.150 and ROr 7.20. The petitioner

never contended that the trial court's interpretation denied him a fair trial by virtue of being an ex post facto enlargement of a procedural statute. Consequently, the Supreme Court of Kentucky was not given the opportunity to consider this precise question.

This Court has consistently held that it will not review a federal question that is being presented for the first time. *Monks v. New Jersey*, 398 U. S. 71 (1970). The rationale underlying this rule is equally consistent. Ordinarily, questions that were not considered below will be based on an inadequate record. Furthermore, states should be given an opportunity to consider a constitutional challenge to a statute so that an opportunity to construe the statute in a manner that would be constitutional might be afforded. *Cardinale v. Louisiana*, 394 U. S. 437 (1969); *Tacon v. Arizona*, 410 U. S. 351 (1973).

This Court has also consistently held that the existence of an independent state ground would preclude review of a related federal question. *Henry v. State of Mississippi*, 379 U. S. 443 (1965). In this case, it is obvious that the Opinion of the Supreme Court of Kentucky was entirely based on considerations of state procedural rules and applicable Kentucky decisions. Unless there exists an extraordinary constitutional situation, state interpretations of state statutes are binding on this Court. *Bell v. State of Maryland*, 378 U. S. 226 (1964).

Since the petitioner's federal question has never been presented to the Supreme Court of Kentucky for its consideration, petitioner's attempts to invoke the

jurisdiction of this Court under 28 U.S.C. §1257(3) are without appreciable merit.

In order to fully apprise this Court as to the nature of the issue involved, the respondent will reply to the argument as if the jurisdictional prerequisites had been properly met. A review of this argument by the Court will demonstrate the validity of the respondent's contentions that the granting of the application for a Writ of Certiorari is not desirable.

#### **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Petitioner has correctly set forth all of the constitutional and statutory provisions needed to resolve the issues presented. The applicable constitutional and statutory provisions are located in the Appendix of the Petition for a Writ of Certiorari to the Supreme Court of Kentucky.

#### **COUNTERSTATEMENT OF THE CASE**

This case involves a petition for review of an appeal to the Supreme Court of Kentucky affirming the judgment of the Johnson Circuit Court, Honorable Hollie Conley, Special Judge, presiding, which imposed a sentence of life imprisonment for the offense of murder.

On July 9, 1975, the petitioner, Morris Wells, was indicted by the Johnson County Grand Jury on one count of murder as denounced by KRS 507.020(1)(a). A trial was conducted which resulted in a mistrial

when the jury was unable to reach a verdict. On September 8, 1976, the Honorable Hollie Conley was designated as Special Judge, and on October 7, 1976, he entered an order setting trial on the indictment for November 15, 1976. Trial was held. At the close of the Commonwealth's case, the petitioner moved for a directed verdict which was denied. Although the petitioner himself did not testify, he did introduce a number of character witnesses to testify as to his good character. The testimony of two of the character witnesses was stricken by the trial court. At the close of all the evidence, petitioner moved for a directed verdict. The jury returned a verdict of guilty and recommended a sentence of life imprisonment.

Petitioner filed a notice and motion for new trial. The record is silent as to the trial court's ruling on the motion. On December 1, 1976, judgment was imposed, and on December 8, 1976, a notice of appeal was filed.

In his appeal to the Supreme Court of Kentucky, the petitioner raised, inter alia, the contention that the trial court erred in admitting into the evidence the testimony given by his wife at the first trial. In essence, the petitioner presented to the Supreme Court of Kentucky a twofold proposition which rested on an unusual factual situation. A review of those facts is necessary.

In January of 1975, Mrs. Mary Wells secured a divorce from her husband, Morris Wells. After her divorce, she met Jimmy Byrge, the deceased, and they frequently dated. On June 22, 1975, the petitioner, Morris Wells, came to her residence. Jimmy Byrge was also present. A gunfight erupted and Byrge was fatally wounded.



After Wells had been indicted, the Commonwealth took its case to trial and Mary Wells testified for the Commonwealth. As an eyewitness, her testimony was particularly significant in that it made abundantly clear that Wells was the aggressor in the tragic altercation. After all the evidence was received, the jury retired to consider its verdict and announced that it was unable to do so. A mistrial was declared and the date for a second trial was set. Between the first and second trials, the petitioner and his former wife remarried.

Prior to the second trial, the trial judge conducted a pre-trial hearing where motions made by the petitioner were considered. At that hearing, Mrs. Wells stated that she had remarried Morris Wells on April 4, 1976 and, therefore, she did not desire to testify at the current proceeding. She invoked the marital privilege contained in KRS 421.210. She also stated that she was divorced from Morris Wells at the time of the alleged crime and had testified for the Commonwealth at the earlier trial.

Testimony was offered by the petitioner, Morris Wells, in which he stated that he objected to his wife's testifying against him at the current trial. He also said that he would object to the use of any prior testimony or depositions at the current proceedings and specifically relied on the provisions of KRS 422.150.

In reviewing the petitioner's claim, the trial court concluded that a previously established exception to the statute was analogous to the situation confronting him and ruled that where the testimony of a witness

was permanently unavailable, whether by death or by invocation of a privilege, the provisions of KRS 422.150 would not apply.

After the hearing, the case went to trial and the previous testimony of Mary Wells was introduced by the Commonwealth. Mrs. Wells did not testify at the second trial. The petitioner was subsequently convicted of murder.

On appeal, the petitioner presented his argument which consisted of two parts. The first argument was grounded on the marital privilege afforded by KRS 421.210. Having established that the remarriage of Mary Wells to the petitioner shielded her from having to testify at the second trial, the petitioner then proceeded to his second proposition by proposing that KRS 422.150 provided an absolute prohibition against the use of prior recorded testimony unless the defendant gave his express consent to the utilization of such testimony. In making this argument, the petitioner brushed aside the impact of RCr 7.20 and RCr 7.22 on KRS 422.150.

The Supreme Court of Kentucky rejected this contention. In a careful analysis of the problem, the Court concluded that the more recently enacted Rules of Criminal Procedure had effectively repealed the procedural provisions of KRS 422.150. In so concluding, the Court said:

"KRS 422.150 provides that the testimony of a witness recorded at a trial may under appropriate circumstances be used as evidence in a subsequent trial, but that 'no testimony so taken shall

be used in any criminal case without the consent of the defendant.' It is a very old statute. Quite obviously it originated in an era when the constitutional legitimacy of this type of evidence was viewed with considerable skepticism. Even before the advent of our Rules of Criminal Procedure, the court was carving from it exceptions deemed essential to consist with simple justice. Cf. *Fuqua v. Commonwealth*, 118 Ky. 578, 81 S. W. 923, 924-925 (1904), in which the proscription against use without consent of the defendant in a criminal case was limited to the recorded testimony of witnesses still living. In 1965 RCr 7.22 placed the trial testimony of a witness on the same footing as a deposition, and in *Noe v. Commonwealth*, Ky., 396 S. W. 2d 808, 810 fn. 1, it was suggested that to the extent of any inconsistency between KRS 422.150 and RCr 7.22 the Rule prevails. As it would be an utter absurdity to say that testimony given by a witness in court could *not* thereafter be used under circumstances in which, had it been taken by deposition outside the courtroom, it *could* be used, surely it must follow that the statutory proscription against its admissibility without consent of the defendant has been superseded by the procedural rules applicable to depositions and can no longer be regarded as having any practical or legal effect." *Wells v. Commonwealth*, 562 S. W. 2d 622, at 623-624. (Emphasis by the Court.)

The Supreme Court of Kentucky then considered the provisions of RCr 7.20 and held that the previously recorded testimony of Mary Wells was admissible at a subsequent trial.

The petitioner then petitioned the Supreme Court of Kentucky for a rehearing. The petition was denied and the Mandate issued. The petitioner correctly states that a stay of execution was granted by the Supreme Court of Kentucky. Petitioner now seeks to invoke the jurisdiction of this Court by petitioning for a writ of certiorari to the Supreme Court of Kentucky.

### **ARGUMENT**

#### **Trial Court's and Kentucky Supreme Court's Interpretation of KRS 422.150 Did Not Violate the Constitutional Rights of the Petitioner.**

The centerpiece of the petitioner's argument is founded upon the contention that it is fundamentally unfair for the trial court and the Supreme Court of Kentucky to rule that since KRS 422.150 had in effect been superseded by the procedural rule of RCr 7.20 and RCr 7.22, the privilege contained within the statute could not be successfully used to block the admission of previously recorded testimony. The petitioner bolsters this argument by weaving the theoretical concepts underlying the Due Process and Ex Post Facto Clauses into one seemingly seamless fabric. Consequently, it is somewhat difficult to sort out the various threads of the argument in a logical and understandable manner. A thorough examination of the various theories as propounded by the petitioner, however, reveals the fact that the petitioner's principal reliance on the Ex Post Facto Clause of the United States Constitution is misplaced. In short, this Court has never interpreted the Ex Post Facto Clause as being a binding restriction on



the judiciary. For this reason, the holding of *Bowie v. City of Columbia*, 378 U. S. 347 (1964), is clearly and quite obviously distinguishable from the case at bar.

*Bowie* was in essence a due process case and the initial contention presented to this Court was whether the trespass statute was constitutionally deficient for being overbroad and vague. The state of South Carolina responded to this contention by noting that the Supreme Court of South Carolina had interpreted the statute in a manner that rendered illegal the actions of the petitioners. See *City of Charleston v. Mitchell*, 239 S.C. 376, 123 S. E. 2d 512, reversed 378 U. S. 551 (1964). This Court noted that such an unexpected construction of the penal statute could not withstand due process scrutiny. Relying on the fundamental concept that a criminal statute must give fair warning as to the type of conduct prohibited, this Court held that the retroactive application of a novel interpretation of a criminal statute violated the basic principles of due process of law.

The situation in this case is totally dissimilar from *Bowie* for two reasons. First of all, the interpretation given to the statute by the trial court in this case could not have been totally unforeseeable to the petitioner. Since 1904, a judicially grafted exception to the statute had been consistently upheld by the Supreme Court of Kentucky. *Fuqua v. Commonwealth*, 118 Ky. 578, 81 S. W. 923 (1904); *Lake v. Commonwealth*, 31 Ky. Law Rep. 1232, 104 S. W. 1003 (1907); and *Denny v. Commonwealth*, 274 Ky. 419, 118 S. W. 2d 778 (1938). This

exception held that the provisions of KRS 422.150<sup>1</sup> would not apply if the witness had died between the first and second trials. Additionally, in 1965, the Supreme Court of Kentucky noted in *Noe v. Commonwealth*, Ky., 396 S. W. 2d 808 (1965), that the provisions of RCr 7.22 were inconsistent with KRS 422.150. The Kentucky court held that in future conflicts between the statute and the rule, the procedural rule would prevail. The continuing vitality of KRS 422.150 was thus considerably weakened by this ruling. In view of these well established cases, the petitioner's contention that the trial court ruling was an unexpected enlargement of the criminal rules is hardly credible.<sup>2</sup>

The petitioner's reliance on the Ex Post Facto Clause as construed in *Bowie* must flounder for the simple reason that KRS 422.150 and RCr 7.22 are procedural rules and are not penal statutes. This Court has consistently held that retroactive application of procedural changes does not violate the Ex Post Facto Clause. *Beazell v. Ohio*, 269 U. S. 167 (1925). See also *Dobbert v. Florida*, 434 U. S. 882 (1977); *Mallett v. North Carolina*, 181 U. S. 589 (1900). Assuming for the sake of argument that the explicit enlargement of the statute had been achieved by legislative action rather than by judicial construction, the tenuousness of the petitioner's contention would be manifest. *Hopt v. Utah*,

<sup>1</sup>*Fuqua* and its progeny actually construed K.S. 4645a, a statute virtually identical to KRS 422.150.

<sup>2</sup>This Court should note that an argument similar to the instant case was considered by the Supreme Court of Kentucky in *Helpenstine v. Commonwealth*, Ky., 566 S. W. 2d 415 (1978). In that case, the Court held the rationale of *Bowie* to be inapplicable to a retroactive interpretation of a statute enlarging the definition of a deadly weapon to include the use of a toy pistol.

110 U. S. 574 (1884), holds squarely against the petitioner. In *Hopt*, the appellant was indicted for murder. At trial, a witness that was considered to be incompetent to testify at the time the offense was committed was, by virtue of a statutory amendment, rendered competent to testify. The testimony that the witness offered was very damaging to Hopt. On appeal to the United States Supreme Court, the appellant argued that this change was ex post facto. In reversing the Court of Appeals which had in turn reversed the trial court's conviction, the Supreme Court of the United States held:

"Statutes which simply enlarge the class of persons who may be competent to testify in criminal cases are not ex post facto in their application to prosecution for crimes committed prior to their passage; for they do not attach criminality to any act previously done, and which was innocent when done, nor aggravate any crime theretofore committed, nor provide a greater punishment therefor than was prescribed at the time of its commission, nor do they alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed. The crime for which the present defendant was indicted, the punishment prescribed therefor, and the quantity or the degree of proof necessary to establish his guilt, all remained unaffected by the subsequent statute. Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed,

might, in respect of that offense, be obnoxious to the constitutional inhibition upon ex post facto laws. *But alterations which do not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt, but—leaving untouched the nature of the crime and the amount or degree of proof essential to conviction—only removes existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury, can be made applicable to prosecutions or trials thereafter had, without reference to the date of the commission of the offense charged."* *Hopt*, *supra* at page 589. (Emphasis added.)

*Accord*, *Thompson v. Missouri*, 171 U. S. 380 (1898); *Duncan v. Missouri*, 152 U. S. 377 (1894); and *Splawn v. California*, 97 S. Ct. 1987, — U. S. — (1977). By way of analogy, *Hopt v. Utah* appears to be dispositive of the petitioner's contentions.

In this argument, the respondent has endeavored to point out to this Court the defects of the petitioner's argument. In so responding, the Commonwealth has shown that the petitioner's assertion that the ruling of the trial court was unexpected is not tenable in light of applicable Kentucky cases. The respondent has also demonstrated that the petitioner's analogous employment of *Bowie v. City of Columbia* ignores the fundamental principles of ex post facto law. In short, the



Commonwealth has shown that the interpretation of the statute was a reasonable one and not unexpected. Furthermore, the statute involves matters of procedure in which the petitioner did not have a vested interest.

The petitioner's argument is fundamentally without merit. The performance of the Supreme Court of Kentucky in resolving the conflict between KRS 422.150 and RCr 7.22 is an inherent obligation of the Court and did not operate to deprive the petitioner of his fundamental right to due process of law. Accordingly, this Court should not grant this petition for a writ of certiorari.

### CONCLUSION

For the reasons stated in the respondent's brief, the petitioner's application for writ of certiorari should be denied.

Respectfully submitted,

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### PROOF OF SERVICE

I, George M. Geoghegan, Jr., one of counsel for respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 2<sup>nd</sup> day of August, 1978, I served the petitioner with Brief for Respondent in Opposition to Petition for Writ of Certiorari, by placing three (3) copies of the same in the United States mail, first class postage prepaid, and addressed to Honorable Dan Jack Combs, 207 Caroline Avenue, Pikeville, Kentucky 41501, and Honorable L. Owen Doyle, 512 Court Street, Paintsville, Kentucky 41240, Counsel for Petitioner, and served the Commonwealth's Attorney by placing one (1) copy of same in the United States mail, first class postage prepaid, and addressed to Honorable Paul Deaton, P. O. Box 448, Paintsville, Kentucky 41240.

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